No. 15-1251

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC.,
DOING BUSINESS AS SOUTHWEST AMBULANCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

SHAY DVORETZKY
Counsel of Record
EMILY J. KENNEDY
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Respondent

QUESTION PRESENTED

Section 3345(b) of the Federal Vacancies Reform Act, 5 U.S.C. § 3345, *et seq.*, limits when a permanent nominee for a vacant office may also serve temporarily as the acting official. The question presented is whether that limitation applies to all temporary officials serving under 5 U.S.C. § 3345(a), or whether it is irrelevant to officials who assume acting responsibilities under Subsections (a)(2) and (a)(3).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are identified in the caption to the case.

Respondent SW General, Inc., d/b/a Southwest Ambulance, is a wholly owned subsidiary of Rural/Metro Corporation. Rural/Metro Corporation is a wholly owned subsidiary of American Medical Response, Inc., which is a subsidiary of Envision Healthcare Corporation. Envision Healthcare Corporation is a subsidiary of Envision Healthcare Holdings, Inc., a publicly held company (NYSE: EVHC). No other publicly held corporation owns 10% or more of Respondent's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 3

A. Statutory Background 3

B. Lafe Solomon Serves As Acting General Counsel Of The NLRB In Violation Of The FVRA 8

C. Proceedings Below 9

REASONS FOR DENYING CERTIORARI 12

I. EVERY COURT THAT HAS CONSIDERED THE QUESTION PRESENTED AGREES THAT SECTION 3345(b)(1)'S PROHIBITION APPLIES TO ALL ACTING OFFICIALS 14

II. THE DECISION BELOW IS CORRECT 16

A. Section 3345(b)(1) Applies To All Acting Officials 16

B. The Government's Contrary Arguments Fail 20

III. THE QUESTION PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15, 22

Cisneros v. Alpine Ridge Grp., 508 U.S. 10 (1993) 20

Crandon v. United States, 494 U.S. 152 (1990) 15, 22

Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998) 4

Edmond v. United States, 520 U.S. 651 (1997) 3

Hooks v. Kitsap Tenant Support Servs., Inc., 816 F.3d 550 (9th Cir. 2016) ..... *passim*

Hooks v. Kitsap Tenant Support Servs., Inc., No. C13-5470, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013) 15

Hooks v. Remington Lodging & Hospitality, LLC, 8 F. Supp. 3d 1178, 1187 (D. Alaska 2014) 15

Kloeckner v. Solis, 133 S. Ct. 596 (2012) 23

Milner v. Dep't of Navy, 562 U.S. 562 (2011) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

N.L.R.B. v. Noel Canning,
134 S. Ct. 2550 (2014) 3

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.,
484 U.S. 97 (1987) 17

Pfizer v. Gov't of India,
434 U.S. 308 (1978) 16

Sandifer v. U.S. Steel Corp.,
134 S. Ct. 870 (2014) 20

Williams v. Taylor,
529 U.S. 362 (2000) 17

STATUTES & CONSTITUTIONAL PROVISIONS

5 U.S.C. § 101 5

5 U.S.C. § 3345 ..... *passim*

5 U.S.C. § 3345(a) 14, 16, 17, 19

5 U.S.C. § 3345(a)(1) ..... *passim*

5 U.S.C. § 3345(a)(2) 7, 19, 21, 26

5 U.S.C. § 3345(a)(3) ..... *passim*

5 U.S.C. § 3345(b)(1) ..... *passim*

5 U.S.C. § 3345(b)(1)(A) 11, 20

5 U.S.C. § 3345(b)(1)(A)(i) 12, 18

5 U.S.C. § 3345(b)(2) 8, 11, 17, 20

5 U.S.C. § 3345(b)(2)(A) 12, 17, 18

5 U.S.C. § 3345(c)(1) 7, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

5 U.S.C. § 3345(c)(2) 21

5 U.S.C. § 3346 ..... 4, 6

5 U.S.C. § 3346(a) 25

5 U.S.C. § 3346(b) 25

5 U.S.C. § 3347 4

5 U.S.C. § 3347(a) 21, 28

5 U.S.C. § 3347(a)(1) 8

5 U.S.C. § 3348 4

5 U.S.C. § 3348(d) 6, 12, 28

5 U.S.C. § 3348(e)(1) 28

5 U.S.C. § 3349 4

29 U.S.C. § 153(d) 8, 14

29 U.S.C. § 158(a) 10

29 U.S.C. § 160(j) 14

Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279 4

Act of July 23, 1868, ch. 227, 15 Stat. 168 4

U.S. Const. art. II, § 2, cl. 2 ..... 1, 3

OTHER AUTHORITIES

144 Cong. Rec.:

(Sept. 28, 1998)

Page S11022 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Page S11024 5

Page S11027 ..... 5, 25

Page S11028 5

Page S11030 6

(Oct. 2, 1998)

Page S12822 ..... 24, 25

Page S12824 24

(June 16, 1998)

Page S6413 4

Page S6414 ..... 6, 25

159 Cong. Rec. S17 (daily ed. Jan. 3, 2013) 9

Black's Law Dictionary (10th ed. 2014) 20

Black's Law Dictionary (6th ed. 1990) 16

Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177 (2001) 18, 23

Guidance on the Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60 (1999) 18, 22

H. Comm. on Oversight & Gov't Reform, 112th Cong., Policy and Supporting Positions app. 1 (Comm. Print 2012) 26

TABLE OF AUTHORITIES
(continued)

Page(s)

Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf 22

Merit Systems Protection Board, *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees Outside the Federal Government* (2008), *available at* http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=323118 26

Morton Rosenberg, Cong. Research Serv., 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (1998) 5

Oxford English Dictionary (2d ed. 1989) 20

S. Rep. No. 105-250 (1998) ..... *passim*

Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 241 (10th ed. 2013) 13

Sup. Ct. R. 10 ..... *passim*

INTRODUCTION

The Appointments Clause of the Constitution requires that many government posts be filled by persons who are nominated by the President and confirmed by the Senate. Art. II, § 2, cl. 2. There are more than a thousand of these so-called PAS positions. When a vacancy arises due to an appointee's death, resignation, or inability to perform the job, the Constitution requires the President to obtain the Senate's advice and consent to a new appointee. Nevertheless, for decades, Presidents from both parties circumvented the Senate's advice-and-consent role by directing their chosen replacements to serve indefinitely in an acting capacity, rather than nominating them for Senate approval. Congress enacted the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 *et seq.*, to combat that problem.

The FVRA allows the President to appoint an acting officer to function temporarily as a caretaker—but subject to carefully circumscribed limits on who may serve in this capacity and for how long. One such limitation, the provision at issue here, generally prevents the same person from serving as an acting official while also being the permanent nominee. That limitation makes sense: Congress did not want the President to install his chosen replacement unless the Senate approved. Allowing the permanent nominee to begin work immediately as an acting official would enable the President to advance his agenda without obtaining the Senate's advice and consent. And with his chosen replacement at the helm anyway, the President would have every incentive to delay submitting a nomination.

The FVRA does contain a narrow exception to the prohibition on acting service by the permanent nominee. The exception is for nominees who have sufficient experience as first assistants to the vacant office or who have themselves been appointed by the President and confirmed by the Senate as first assistants. That is because these individuals are the quintessential competent caretakers, and their appointment to the vacant office is unlikely to prompt the sort of change in direction for the agency that acutely implicates the Senate's advice-and-consent function.

The Government seeks to create an additional exception. It claims that any of the potentially thousands of GS-15 employees within the same agency, or any of the hundreds of PAS officials in wholly unrelated offices in other agencies, may also serve as acting officials even when nominated for the permanent position.

The D.C. Circuit correctly rejected the Government's interpretation of the FVRA, and its decision does not warrant this Court's intervention. Every court that has considered the question presented agrees that the FVRA is clear. Although the Government insists that the issue is important, it identifies only 14 officials over the FVRA's 18-year history whose actions are even arguably implicated by the decision below. This Court does not sit to review splitless questions of limited significance. The petition for certiorari should be denied.

STATEMENT

A. Statutory Background

The FVRA protects the Senate's constitutionally mandated role in the appointment of "Officers of the United States." U.S. Const. art. II, § 2, cl. 2; *see* Pet. App. 4a. Specifically, the Appointments Clause provides that such officers "shall" be nominated by the President "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. In the decades leading up to the FVRA's enactment, Presidents from both political parties had circumvented the Senate's role by directing their chosen replacements to perform the functions of a vacant PAS position in an acting capacity, rather than nominating them. Congress enacted the FVRA to reclaim its role in the appointments process.

1. The advice-and-consent requirement of the Appointments Clause is a "significant structural safeguard[]" intended to "curb Executive abuses of the appointment power and to promote a judicious choice of persons for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (internal quotation marks and citations omitted); *see also N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). Although the President alone has the power to nominate officers of the United States, the Constitution also requires Senate approval. U.S. Const. art. II, § 2, cl. 2; *see Noel Canning*, 134 S. Ct. at 2559. In other words, "[t]he president's duty is to submit nominees for offices to the Senate, not to fill those offices himself." S. Rep. No. 105-250 at 5 (1998).

Recognizing that vacancies can occur unexpectedly and that confirmation takes time, Congress has long

given the President limited power to appoint acting officials to serve temporarily without first obtaining the Senate's approval. *See* Pet. App. 2a-3a (citing Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281; Act of July 23, 1868, ch. 227, 15 Stat. 168); *see also* 144 Cong. Rec. S6413 (daily ed. June 16, 1998) (statement of Sen. Thompson). The FVRA's predecessor, the Vacancies Act, restricted the pool of individuals the President could appoint to act temporarily and limited the time they could serve. *See* 5 U.S.C. §§ 3345-3348 (1988) (limiting acting official to first assistant or person holding PAS position within the administration, and setting 120-day limit on service).

But the limitations in the Vacancies Act were ineffective. The Vacancies Act said nothing about the validity of actions taken by acting officials who had served in violation of the statute. *See id.* §§ 3345-3349. Moreover, courts held that a subsequent official who was properly appointed could ratify the prior actions of an improperly appointed acting officer. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 214 (D.C. Cir. 1998). And some administrations claimed that certain agencies retained discretion to appoint acting officials without regard to the Vacancies Act at all. *See* S. Rep. No. 105-250 at 3.

Presidents from both parties took advantage of these loopholes to put their chosen replacements to work as long-term acting officials without requesting (much less obtaining) Senate approval. For example, as of May 1997, "almost all of the top positions at the Justice Department were being filled in an acting capacity," including "the Associate Attorney General, Solicitor General, Assistant Attorney General for

Civil Rights, Assistant Attorney General for the Criminal Division, and Assistant Attorney General for the Office of Legal Counsel." 144 Cong. Rec. S11028 (daily ed. Sept. 28, 1998) (statement of Sen. Thurmond). Many of these acting officials served for years before the President submitted a nomination. *See* S. Rep. No. 105-250 at 3 (Acting Solicitor General served for over a year before any nomination was submitted); 144 Cong. Rec. S11028 (statement of Sen. Thurmond) (Acting Assistant Attorney General of the Criminal Division served for two and a half years before any nomination was submitted); *see also* 144 Cong. Rec. S11022 (statement of Sen. Thompson) (Acting Director of Office of Thrift Supervision "served for 4 years without a nomination for the position ever having been submitted to [the Senate]"). As of 1998, approximately 20% of PAS positions in Executive departments were being filled by "temporary designees, most of whom had served well beyond the 120-day limitation period of the [Vacancies] Act without presidential submissions of nominations." Morton Rosenberg, Cong. Research Serv., 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 1 (1998); *see* S. Rep. No. 105-250 at 5; *see also* 5 U.S.C. § 101 (listing the 15 Executive departments).

As a result, "acting officials who ha[d] not received the advice and consent of the Senate [were] run[ning] the Government indefinitely." 144 Cong. Rec. S11022 (statement of Sen. Thompson); *see also* 144 Cong. Rec. S11024 (statement of Sen. Byrd); 144 Cong. Rec. S11027 (statement of Sen. Levin). "Such a scheme obliterate[d] the constitutional requirement that the officer serve only after the Senate confirms the

nominee." S. Rep. No. 105-250 at 7. And it undermined a core premise of the Appointments Clause, that "[t]he government's important functions should be carried out by permanent officials." 144 Cong. Rec. S6414 (statement of Sen. Thompson).

2. Congress enacted the FVRA to stop these Executive "runaround[s] of" the Appointments Clause. 144 Cong. Rec. S11030 (statement of Sen. Byrd); *see* S. Rep. No. 105-250 at 5.

The FVRA "establish[es] a process that permits the routine operation of the government to continue, but that will not allow the evasion of the Senate's constitutional authority to advise and consent to nominations." 144 Cong. Rec. S6414 (statement of Sen. Thompson). To that end, the FVRA permits certain individuals to temporarily perform the duties of a PAS position in an acting capacity, but imposes limitations on who may do so. *See* 5 U.S.C. § 3345. It further restricts the length of time such an official may serve. *See id.* § 3346. It encourages the President to submit timely nominations by extending those time limits when a nomination is pending, and extinguishing the acting officer's authority if a nomination is not submitted within 210 days of the vacancy. *See id.*; S. Rep. No. 105-250 at 14. Finally, the FVRA enforces these requirements by providing that actions taken by certain officials who serve in violation of the statute "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d). Together, these provisions "create an incentive for the President to submit a nomination," and they ensure that "constitutionally mandated procedures ... [are] satisfied before acting officials may serve in

positions that require Senate confirmation." S. Rep. No. 105-250 at 8, 14.

In particular, Section 3345 limits the pool of individuals who may serve as an acting official, thereby preventing the President from "nam[ing] temporary officers of his unfettered choice." *Id.* at 8. Section 3345(a)(1) sets forth the default rule: "[T]he first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). The President may override this default rule by "direct[ing]" either "a person who serves in [another PAS position]" within the Government, or a senior government employee (i.e., an employee who has worked for at least 90 days at a pay rate of GS-15 or higher) from the same agency, "to perform the functions and duties of the vacant office temporarily in an acting capacity." *Id.* § 3345(a)(2)-(3).[1]

Section 3345(b), the provision at issue here, imposes additional restrictions on acting officers whom the President has nominated for permanent appointment. Section 3345(b)(1) provides that "a person may not serve as an acting officer under this section" if the President nominates him for the vacant PAS office and, during the year preceding the vacancy, he either "did not serve in the position of first assistant" at all or "served in the position of first

---

[1] In the context of certain Executive offices of a fixed term, the President also "may direct an officer who is nominated by the President for reappointment for an additional term to the same office ... without a break in service, to continue to serve in that office" while his nomination for reappointment is pending. 5 U.S.C. § 3345(c)(1).

assistant" for less than 90 days. *Id.* § 3345(b)(1). In other words, under Section 3345(b)(1), a nominee can serve as the acting official only if he is an experienced first assistant. *See id.* Section 3345(b)(2) creates a further exception to the restriction on acting service by a nominee. It allows first assistants with less than 90 days of experience to serve as both the acting official and the permanent nominee if the first assistant position is itself a PAS position and "the Senate has approved the appointment of such person to such office." *Id.* § 3345(b)(2).

B. Lafe Solomon Serves As Acting General Counsel Of The NLRB In Violation Of The FVRA

This case arises from Lafe Solomon's service as Acting General Counsel of the NLRB.

Under the National Labor Relations Act (NLRA), the General Counsel of the NLRB must be appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153(d). He has "final authority ... in respect of the investigation of charges and issuance of complaints" alleging unfair labor practices. *Id.*

In June 2010, Ronald Meisburg resigned as NLRB General Counsel. The President directed Mr. Solomon to serve as the Board's Acting General Counsel pursuant to Section 3345(a) of the FVRA. *See* Pet. App. 5a.[2] At that time, Mr. Solomon was not

[2] The President did not invoke the NLRA's alternative method for appointing a temporary Acting General Counsel, "perhaps because the FVRA allows an acting officer to serve for a longer period of time." Pet. App. 6a (citing 29 U.S.C. § 153(d)); *see* 5 U.S.C. § 3347(a)(1)(A) (FVRA does not override statutory

the first assistant to the General Counsel, and his position did not require Presidential appointment or Senate confirmation. Mr. Solomon did, however, satisfy the salary and experience requirements of the FVRA's senior government employee provision, 5 U.S.C. § 3345(a)(3), because he had been serving as the Director of the NLRB's Office of Representation Appeals for ten years. *See* Pet. App. 11a.

Six months later, on January 5, 2011, the President nominated Mr. Solomon to serve as NLRB General Counsel on a permanent basis. *See* Pet. App. 6a. The Senate did not act on that nomination, and it was returned to the President. *See* Pet. App. 6a (citing 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013)). The President resubmitted Mr. Solomon's nomination on May 24, 2013, but ultimately withdrew it and nominated Richard Griffin, who was confirmed by the Senate on October 29, 2013. *See* Pet. App. 6a. Mr. Solomon served as Acting General Counsel from June 21, 2010, to November 4, 2013.

C. Proceedings Below

In January 2013, while Mr. Solomon was serving as the NLRB General Counsel on an acting basis, an unfair labor practice complaint was issued against Respondent SW General, Inc. *See* Pet. App. 7a. The complaint alleged that Respondent violated the NLRA by unilaterally discontinuing annual bonus payments to certain long-term employees. *See* Pet.

(continued...)

provisions "expressly" authorizing the President to designate acting official); S. Rep. No. 105-250 at 1 (FVRA does not override appointment provision in NLRA).

App. 7a (citing 29 U.S.C. § 158(a)(1), (5)); Pet. App. 40a. Respondent argued that it fulfilled its obligations to make such payments under the collective bargaining agreement, and that it had no duty to make additional payments after that agreement expired. *See* Pet. App. 62a-63a. An administrative law judge (ALJ) disagreed. *See* Pet. App. 104a.

Respondent filed exceptions to the ALJ's decision. *See* Pet. App. 7a. In addition to contesting the ALJ's legal and factual findings, Respondent argued that the complaint was invalid because Acting General Counsel Solomon was serving in violation of the FVRA. *See* Pet. App. 7a. The NLRB adopted the ALJ's recommended order without addressing Respondent's FVRA challenge. *See* Pet. App. 7a; *see also* Pet. App. 31a-37a.

In an opinion by Judge Henderson (joined by Judges Srinivasan and Wilkins), the D.C. Circuit vacated the NLRB's order. *See* Pet. App. 1a-30a. The court agreed with Respondent that the complaint was unauthorized because Section 3345(b)(1) rendered Mr. Solomon "ineligible to serve as Acting General Counsel once the President nominated him to be General Counsel." Pet. App. 7a. Section 3345(b)(1), the court explained, "prohibits a person from being both the acting officer and the permanent nominee unless (1) he served as the first assistant to the office in question for at least 90 of the last 365 days or (2) he was confirmed by the Senate to be the first assistant." Pet. App. 11a (citing 5 U.S.C. § 3345(b)(1)-(2)).

The court held that the FVRA makes clear that Section 3345(b)(1)'s prohibition applies to "all acting officers," not just those who assume their position under Subsection (a)(1). *See* Pet. App. 11a, 20a. Subsection (b)(1) begins: "Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if [certain criteria are met]." 5 U.S.C. § 3345(b)(1). The term "a person," the court explained, is "broad" and "covers the full spectrum of possible candidates for acting officer." Pet. App. 12a. "And the phrase 'this section' plainly refers to section 3345 in its entirety"; it is not limited to subsection (a)(1). Pet. App. 12a. "Thus, the plain language of subsection (b)(1) manifests that no person can serve as both the acting officer and the permanent nominee (unless one of the exceptions in subsections (b)(1)(A) or (b)(2) applies)." Pet. App. 13a.

The court rejected the Government's contrary interpretation, which "focus[ed]" on the phrase, "[n]otwithstanding subsection (a)(1)." Pet. App. 13a. According to the Government, this phrase "limits subsection (b)(1)'s prohibition to first assistants who become acting officers pursuant to subsection (a)(1)." Pet. App. 13a. But the word "notwithstanding" means "in spite of," not "for purposes of" or "with respect to." Pet. App. 13a. The "'notwithstanding' clause" therefore does not restrict "the ultimate scope of subsection (b)(1)." Pet App. 14a.

In the face of the FVRA's "plain language," the court found the Government's reliance on inconsistent floor statements and other legislative history unpersuasive. Pet. App. 17a. The court also noted that the Government's reading might render other provisions of Section 3345 "superfluous." Pet.

App. 15a-16a. In particular, references to the first assistant in Sections 3345(b)(1)(A)(i) and 3345(b)(2)(A) would be unnecessary if Section 3345(b)(1) already referred only to first assistants. *See* Pet. App. 15a-16a; *infra* 17-19.

"Because Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011," the court held that he "served in violation of the FVRA from that date forward." Pet. App. 20a. The court next considered the consequences of Mr. Solomon's invalid service. Although actions taken in violation of the FVRA generally "shall have no force or effect" and "may not be ratified," the FVRA creates an exception for actions taken by five types of officials, including the General Counsel of the NLRB. 5 U.S.C. § 3348(d), (e)(1)-(5). Therefore, rather than being automatically void, Mr. Solomon's actions were subject to certain potential defenses by the Government. *See* Pet. App. 21a-22a. Here, however, neither of the Government's defenses salvaged Mr. Solomon's actions. Pet. App. 22a-29a. The court accordingly dismissed the complaint and vacated the NLRB's order. Pet. App. 30a.

The Government filed a petition for rehearing en banc, which was denied without comment by a vote of 7-3. Pet. App. 114a.

REASONS FOR DENYING THE PETITION

"Review on a writ of certiorari is not a matter of right," and this Court exercises its "judicial discretion" to grant the writ "only for compelling reasons." Sup. Ct. R. 10. The quintessential reason for granting review is to address "real or intolerable conflict[s]"

among federal or state appellate courts on "important" questions of federal law. Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 241 (10th ed. 2013) (internal quotation marks omitted); *see* Sup. Ct. R. 10(a)-(c). In addition to implicating "recurring" "issues of national importance," such conflicts should be "well-developed." Shapiro, *supra*, 240, 246-47. Certiorari may also be warranted where a decision "holds a federal statute unconstitutional." *Id.* at 264. But absent a conflict or serious constitutional question, this Court does not typically grant review. *See id.* at 239-40. That is particularly true where there is little doubt that the decision below is correct. *See id.*

All of these traditional criteria counsel in favor of denying this petition. This case presents a straightforward issue of statutory interpretation on which there is no conflict of authority. To the contrary, every court that has considered the question presented agrees: Section 3345(b)(1) applies to all acting officials.

The Government's dissatisfaction with that universal understanding of the statute is not a basis for this Court's review. The D.C. Circuit properly applied traditional principles of statutory interpretation to give the FVRA its plain meaning. Lacking any compelling reason justifying this Court's intervention, the Government inflates the importance of the question presented, insisting that this Court's immediate review is necessary to provide certainty going forward. But the FVRA is clear (and despite that, by the Government's own account, a half-dozen acting officers are still serving in violation of the unanimous interpretation of all courts). The only

uncertainty is whether the Executive Branch will obey the law. It does not need this Court's assistance to do so.

I. EVERY COURT THAT HAS CONSIDERED THE QUESTION PRESENTED AGREES THAT SECTION 3345(b)(1)'S PROHIBITION APPLIES TO ALL ACTING OFFICIALS

The Government does not even attempt to argue that the decision below conflicts with a decision from any other court. *See* Sup. Ct. R. 10. In fact, every court to consider the question presented has concluded that Section 3345(b)(1)'s prohibition applies to all acting officials, not just first assistants.

The only other circuit that has addressed the issue "agree[s] with the D.C. Circuit as to § 3345(b)(1)'s reach." *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558 (9th Cir. 2016) (Friedland, J.). *Kitsap*, like this case, involved the validity of actions that Mr. Solomon took while serving as the NLRB General Counsel on an acting basis. *See id.* at 554. The NLRB filed a petition for injunctive relief pursuant to Section 10(j) of the NLRA, 29 U.S.C. § 160(j). *Id.* The employer argued that the petition was invalid because Mr. Solomon, whose acting service violated the FVRA, could not authorize it. *See id.* (citing 29 U.S.C. §§ 153(d), 160(j)).

In a unanimous opinion, the Ninth Circuit agreed with the D.C. Circuit's "thorough[] analy[sis] [of] the statutory text and legislative history." *Id.* at 558. It held that "the text of the FVRA clearly and unambiguously operates to make (b)(1) applicable to all subsections of § 3345(a), not merely to (a)(1)." *Id.* at 562. The court rejected the Government's contrary

argument, which "conflicts with the plain text of the statute." *Id.* at 564. And it was not persuaded by the Government's reliance on "inconclusive" legislative history. *Id.* at 562.

District courts that have considered the question presented agree: "[W]hen Solomon was nominated to the General Counsel position, his temporary appointment became invalid pursuant to section 3345(b)(1)." *Hooks v. Remington Lodging & Hospitality, LLC*, 8 F. Supp. 3d 1178, 1187 (D. Alaska 2014); *see Hooks v. Kitsap Tenant Support Servs., Inc.*, No. C13-5470, 2013 WL 4094344, at *2 (W.D. Wash. Aug. 13, 2013).

The only "conflict" the Government identifies is with "the Executive Branch's longstanding interpretation" of the FVRA. Pet. 5. The Government properly does not suggest that conflicts with agency opinions, particularly opinions that are not entitled to deference, are the sort of conflicts this Court typically intervenes to resolve. *See* Sup. Ct. R. 10; Shapiro, *supra*, 241-43; *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (OLC opinions not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Nor does a party's—including the Government's—subjective disagreement with the decision below provide a basis for this Court's intervention. *See* Sup. Ct. R. 10.

If the question presented is as important as the Government argues, *but see infra* 27-28, it will recur, and the Court will have another opportunity to grant certiorari if a circuit split develops. Absent a conflict among the circuits, however, this Court's review is

premature and unwarranted. *See* Sup. Ct. R. 10; Shapiro, *supra*, 240, 246-47

II. THE DECISION BELOW IS CORRECT

The Government devotes most of its petition to the merits of the question presented. This Court does not typically grant certiorari merely to correct errors. *See* Sup. Ct. R. 10. In any event, the D.C. Circuit did not err. The text, structure, and purpose of the FVRA all point to the same conclusion: Section 3345(b)(1) applies to all acting officers, not just first assistants serving under Subsection (a)(1).

A. Section 3345(b)(1) Applies To All Acting Officials

As both the D.C. and Ninth Circuits unanimously concluded, the language of Section 3345(b)(1) is "clear." Pet. App. 18a; *see Kitsap*, 816 F.3d at 562. It "unambiguously operates to make (b)(1) applicable to all subsections of § 3445(a), not merely to (a)(1)." *Kitsap*, 816 F.3d at 562.

1. Subsection (b)(1) provides that, "[n]otwithstanding subsection (a)(1), *a person* may not serve as an acting officer for an office *under this section*" under specified circumstances. 5 U.S.C. § 3345(b)(1) (emphasis added).

Congress's use of the term "a person" confirms that it was referring to all acting officials. These words have broad and inclusive meaning. *See* Black's Law Dictionary 1142 (6th ed. 1990) (defining "person" to mean "a human being"); *id.* at 1477 (word "a" has a "generalizing force"); *see also Pfizer v. Gov't of India*, 434 U.S. 308, 312 (1978) ("the phrase 'any person'" has a "naturally broad and inclusive meaning"). They include "the full spectrum of possible

candidates for acting officer." Pet. App. 12a. Had Congress intended to refer only to first assistants, "it likely would have said 'first assistant' instead of 'a person.'" *Kitsap*, 816 F.3d at 559.

Moreover, Congress's use of the words "this section" indicates that it "intended to refer to § 3345 in its entirety." *Id.* As other provisions within Section 3345 confirm, Congress knew how to identify a particular subsection or paragraph when it wanted to do so. *See, e.g.*, 5 U.S.C. § 3345(a)(3)(B) ("subparagraph (A)"); *id.* § 3345(b)(2) ("Paragraph 1"); *id.* § 3345(b)(2)(A) ("subsection (a)"); *id.* § 3345(c)(1) ("subsection (a)(1)"). Congress's reference to "this section" rather than to Subsection (a)(1) must have meaning. *See, e.g.*, *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 106 (1987).

2. The structure of Section 3345 bolsters this conclusion. "It is ... a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). As both the D.C. and Ninth Circuits recognized, construing Section 3345(b)(1) to apply to first assistants, PAS officers, and senior government employees alike avoids superfluity. *See* Pet. App. 15a; *Kitsap*, 816 F.3d at 560.

First, these courts' interpretation of Section 3345(b)(1) gives meaning to the exception in Section 3345(b)(2)(A) for a "person [who] is serving as the first assistant to the office of an officer described under subsection (a)." If Section 3345(b)(1)'s reference to "a person" includes *only* first assistants, there would be no need for an exception in Subsection

(b)(2)(A) for individuals serving as first assistants: "[T]he current first assistant—whether he became first assistant before or after the vacancy—is necessarily serving as a first assistant." Pet. App. 16a. Indeed, by equating "person" with "first assistant," the Government reads Subsection (b)(2)(A) to apply to "a first assistant" who "is serving as the first assistant." As the Government recognizes, therefore, its reading reduces Section 3345(b)(2)(A) to a mere "restate[ment]" of already-applicable criteria. Pet. 18.

Second, interpreting Section 3345(b)(1) to apply only to first assistants could render the condition in Subsection (b)(1)(A)(i)—that the person "'did not serve in the position of first assistant to the office'" in the prior 365 days—"inoperative" as well. Pet. App. 16a (quoting 5 U.S.C. § 3345(b)(1)(A)(i)). Although neither court needed to reach the question, both the D.C. and Ninth Circuits noted that "subsection (a)(1) may refer [only] to the person who is serving as first assistant *when the vacancy occurs*." Pet. App. 15a; *see Kitsap*, 816 F.3d at 560. If this interpretation is correct—a question on which the Government has flip-flopped[3]—then Subsection (b)(1)(A)(i) would be superfluous because the first assistant at the time of the vacancy "*necessarily* served as first assistant in

[3] OLC initially concluded that "the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer [under Section 3345(a)(1)]." Guidance on the Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63-64 (1999). OLC later determined that its "initial understanding was erroneous" and reversed course. Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001).

the previous year." Pet. App. 16a; *see Kitsap*, 816 F.3d at 560. By contrast, interpreting Section 3345(b)(1) to reach all acting officers avoids superfluity because "many PAS officers (subsection (a)(2)) and senior agency employees (subsection (a)(3)) will not have served as the first assistant in the prior year." Pet. App. 16a; *see Kitsap*, 816 F.3d at 560.

3. The D.C. Circuit's understanding that Section 3345(b)(1) applies to all acting officials is also consistent with the purposes of the FVRA.

Congress's primary goal was to reclaim its role under the Appointments Clause by preventing the President from directing his chosen replacement to perform PAS functions as an acting official without subjecting that individual to the Senate's scrutiny. *See supra* 4-6. Section 3345(b)(1) advances that purpose. By generally preventing a nominee from simultaneously serving as an acting official, that provision requires the President to obtain the Senate's advice and consent before advancing his agenda. Congress allowed the President to choose from a specified pool of competent caretakers—first assistants, PAS officers, and senior agency employees—to serve as acting officials. *See* 5 U.S.C. § 3345(a). Congress thus sought to allow an agency to continue functioning, with minimal change in direction, without having to wait for Senate approval. *See* S. Rep. No. 105-250 at 12. But when it comes to the permanent nominee, Congress wanted to preserve its constitutional role. *See id.* at 5. Congress did not want the President to set his chosen replacement to work without first nominating an official and obtaining Senate approval.

Section 3345(b)'s limited exception for nominees who are also experienced or Senate-confirmed first assistants is consistent with these objectives. *See* 5 U.S.C. § 3345(b)(1)(A), 3345(b)(2). By virtue of their longstanding or Senate-approved work as first assistants, these individuals are the acting officials *most* competent to keep the agency humming. And as nominees, they are the least likely to represent a change to the status quo. It accordingly makes sense that Congress chose to allow these individuals—and no others—to continue to serve in an acting role even when nominated to fill the permanent position.

B. The Government's Contrary Arguments Fail

The Government's attempts to overcome Section 3345(b)(1)'s unambiguous text are unavailing.

1. The Government's principal argument is that the phrase "[n]otwithstanding subsection (a)(1)" means that Section 3345(b)(1) creates "an exception *only* to Subsection (a)(1)." Pet. 14 (emphasis added). But courts interpret words according to "their ordinary, contemporary meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). The ordinary meaning of "notwithstanding" is "in spite of." Oxford English Dictionary (2d ed. 1989); Black's Law Dictionary (10th ed. 2014). Thus, "the use of ... a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993).

Here, the "notwithstanding" clause "simply means that (b)(1)'s limitations control, even to the extent

that (a)(1)'s automatic directive that first assistants 'shall' serve in an acting capacity may conflict with those limitations." *Kitsap*, 816 F.3d at 559. But that does not mean "that (b)(1) applies *only* to (a)(1)." *Id.* Had Congress intended that result, it would have said "for purposes of" or "with respect to" Subsection (a)(1)—terms with meanings different than "notwithstanding." Pet. App. 13a. Indeed, Congress's use of the phrase "[f]or purposes of" elsewhere in Section 3345 confirms that "it knew how to use limiting language when it wanted to." Pet. App. 15a (citing 5 U.S.C. § 3345(c)(2)).

The Government argues that, if Congress had intended to apply Section 3345(b)(1) to all acting officials, it would have "provided that the limitations apply '[n]otwithstanding subsections (a)(1), (a)(2), and (a)(3).'" Pet. 14. That argument ignores that Subsections (a)(2) and (a)(3), unlike Subsection (a)(1), do not create an automatic, default rule. *See* 5 U.S.C. § 3345(a)(1) (the first assistant "shall" take over as acting officer); *Kitsap*, 816 F.3d at 560. It is hardly surprising that Congress singled out Subsection (a)(1) for express override because it is the one provision that, by virtue of its mandatory language, most directly conflicts with Subsection (b)(1).

2. Responding to the D.C. Circuit's textual analysis, the Government claims that the words "this section" "clarif[y]" that Subsection (b)(1) "does not apply to non-FVRA designations made under other statutory provisions." Pet. 17 n.2. That is wrong because Section 3347(a) already makes clear that certain statutory provisions provide independent alternatives to the FVRA. 5 U.S.C. § 3347(a); *see* S. Rep. No. 105-250 at 15-17. There was no need for

additional clarification. And even if there were, Congress would not have clarified matters by referring to "this section" if it meant to include only officials acting pursuant to "Subsection (a)(1)."

The Government's argument that the term "a person" includes first assistants serving under Subsection (a)(1) fares no better. *See* Pet. 16. PAS officials are people, too. So are GS-15 employees. Congress's all-inclusive language encompasses all three types of acting officials.

3. The Government next accuses the D.C. Circuit of "repudiat[ing]" the Executive Branch's "longstanding interpretation" of the FVRA, reflected in guidance from the Office of Legal Counsel. Pet. 11, 14; *see* 23 Op. O.L.C. at 64. An "advisory opinion[] ... of the ... OLC," of course, "is not an administrative interpretation that is entitled to deference under *Chevron*." *Crandon*, 494 U.S. at 177 (Scalia, J., concurring).

Moreover, the "longstanding interpretation" on which the Government relies so heavily is a conclusory statement lacking any analysis of the FVRA. *See* 23 Op. O.L.C. at 64; *see also* Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 2-4 (Feb. 23, 2001), http://www.gao.gov/assets/80/75036.pdf (assuming without explanation that Section 3345(b)(1)'s prohibition applies only to first assistants). OLC subsequently repudiated one of the conclusions it reached in this

same "question and answer" memorandum, explaining that it "did not thoroughly consider" the issue and its "initial understanding was erroneous." 25 Op. O.L.C. at 179. OLC's unreasoned understanding of Section 3345(b)(1) is equally deficient.

4. The Government next turns to legislative history. However, "even the most formidable argument concerning the statute's purposes could not overcome" its unambiguous text. *Kloeckner v. Solis*, 133 S. Ct. 596, 607 n.4 (2012); *see supra* 16-19. And the Government's evidence of legislative intent is "anything but" formidable. Pet. App. 17a. The D.C. Circuit correctly refused to "allow[] ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011); *see* Pet. App. 17a.

As an initial matter, the Government relies on a version of the FVRA that Congress never enacted. It emphasizes that the predecessor to Section 3345(b)(1) contained in an earlier draft bill applied only to first assistants.[4] *See* Pet. 23. From that, the Government extrapolates that the same limitation carried through to the FVRA. *See* Pet. 23-24. The Government's logic fails because the language that Congress ultimately enacted "looks quite different"—suggesting, if

---

[4] The unenacted language provided that a person whom the President has nominated for appointment "may not serve as an acting officer for an office under this section" if that person (1) "serves in the position of first assistant to such officer" on the date of the vacancy, and (2) has held that position for less than 180 of the past 365 days. S. Rep. No. 105-250 at 25.

anything, that Congress jettisoned the earlier limitation. Pet. App. 19a; *see Kitsap*, 816 F.3d at 563.

The legislative history discussing the enacted version of Section 3345(b)(1) is, at best, "inconclusive." *Kitsap*, 816 F.3d at 562. The Government is quick to quote Senator Thompson's statement supporting its view that Section 3345(b)(1) "'applies only when the acting officer is the first assistant.'" Pet. 25 (quoting 144 Cong. Rec. S12822 (daily ed. Oct. 21, 1998)). But that "is not the only statement on the subject." *Kitsap*, 816 F.3d at 562. Senator Byrd, an "original sponsor" of the FVRA, contradicted Senator Thompson. 144 Cong. Rec. S12824 (statement of Sen. Byrd); *see* Pet. App. 17a-18a; *Kitsap*, 816 F.3d at 562. "[H]ew[ing] much more closely to the statutory text," Senator Byrd "suggested that subsection (b)(1) applies to all categories of acting officers." Pet. App. 18a & n.6 (citing 144 Cong. Rec. S12824 (statement of Sen. Byrd)).

The Government argues that expanding Subsection (b)(1)'s restrictions beyond those included in the initial draft bill is inconsistent with other changes Congress made to "enhance the flexibility of the statute." Pet. 24. For example, Congress added GS-15 employees as a third category of individuals eligible to serve as acting officers and reduced the time-in-service requirement in Subsection (b)(1) to 90 from 180 days. *Compare* S. Rep. No. 105-250 at 25, *with* 5 U.S.C. § 3345. But it is entirely sensible for Congress to increase the President's flexibility in one respect while limiting it in another.

As noted, Congress's primary goal was to prevent the President from directing his chosen replacement to perform PAS functions as an acting official without Senate approval. *See supra* 6-8. Congress's willingness to allow within-agency GS-15 employees to serve as acting officials recognized the need for greater flexibility. Not all PAS positions, after all, have first assistants, and moving individuals from other PAS positions would simply create new vacancies. *See* 144 Cong. Rec. S12822 (statement of Sen. Thompson); 144 Cong. Rec. S11027 (statement of Sen. Levin). Expanding the pool of potential acting officials thus "permit[ted] the routine operation of the government to continue." 144 Cong. Rec. S6414 (statement of Sen. Thompson).

However, allowing a broader pool of people to act while also serving as nominees—potentially for years, *see* 5 U.S.C. § 3346(a)-(b)—would threaten to "obliterate[] the constitutional requirement that the officer serve only after the Senate confirms the nominee." S. Rep. No. 105-250 at 7; *see supra* 3-6. By generally preventing nominees from simultaneously serving as acting officials, Congress ensured that the President would obtain the Senate's approval before advancing his agenda. And it sought to preserve the status quo in the meantime, by allowing a limited pool of caretakers to keep the agency running.

5. Finally, the Government claims that interpreting Section 3345(b)(1) to apply to all acting officials under the FVRA is unnecessary to protect the Senate's advice-and-consent role. The Government recognizes that Section 3345(b)(1) is critical to preventing "the Executive Branch from

circumventing the advice-and-consent process" through the "use of eleventh-hour first-assistant appointments." Pet. 13. It nevertheless claims there are no similar concerns when the acting official selected by the President holds a different PAS position, or is a GS-15 employee, because Subsections (a)(2) and (a)(3) already protect the Senate's advice-and-consent role. Pet. 21.

The Government is wrong. There are more than 1,200 PAS positions across dozens of agencies. *See* H. Comm. on Oversight & Gov't Reform, 112th Cong., Policy and Supporting Positions app. 1, at 200 (Comm. Print 2012). These positions involve different skill sets, areas of expertise, and types of responsibility. Compare, for example, the Attorney General, Secretary of Defense, NASA Administrator, Federal Mine Safety and Health Review Commission members, and National Council on the Humanities members. Senate confirmation for one of these positions is hardly a proxy for the Senate's consent to the same individual's service in an entirely different PAS office.

Likewise, there are thousands of GS-15 employees, many of whom are hired from outside the Government each year. In 2005, for example, the Government filled more than 3,000 positions at the GS-15 level with external applicants. Merit Systems Protection Board, *In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees Outside the Federal Government*, at 9 (2008), *available at* http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=323118&version=323564&application=ACROBAT. Service in a particular agency for at least 90 days during the year

preceding a vacancy may make an individual competent to keep things running when a vacancy arises. *See* 5 U.S.C. § 3345(a)(3). But it is no substitute for Senate approval before a chosen nominee begins to advance the President's agenda under the guise of acting service. That would "circumvent[] the advice-and-consent process" no less than when an eleventh-hour first assistant serves both roles. Pet. 13.

* * *

In sum, the D.C. Circuit's interpretation of the FVRA comports with the statute's text, structure, and purpose. The Government's arguments to the contrary do not merit this Court's review.

III. THE QUESTION PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW

At bottom, the Government seeks certiorari based on its view of the importance of the question presented. It is therefore surprising that, out of the hundreds if not thousands of potential vacancies in PAS positions over the 18 years since the FVRA became law, the Government identifies only 14 acting officials whose conduct even arguably is affected by the decision below. *See* Pet. 5-6, 10. The Government vastly overstates the significance of the D.C. Circuit's holding.

The Government nevertheless worries that the decision below will create "uncertainty" when a new President takes office next year. Pet. 26, 30-31. There is no uncertainty: All courts agree that the FVRA is clear and unambiguous. *Supra* 14-15. The

new Administration simply needs to follow its mandates.

The Government further claims that interpreting Section 3345(b)(1) according to its plain meaning "significantly curbs the President's appointment authority." Pet. 26. Not so. The President remains free to *nominate* anyone he chooses for any PAS position. By contrast, he has never been free to "name temporary officers of his unfettered choice." S. Rep. No. 105-250 at 8. In any event, Section 3345(b)(1) does not meaningfully restrict the pool of potential acting officers. It imposes restrictions only on "acting officers who may *also be nominated* for permanent posts." *Kitsap*, 816 F.3d at 563; *see* Pet. App. 19a-20a. Moreover, approximately 40 other statutes provide independent, alternative avenues for installing acting officers. *See Kitsap*, 816 F.3d at 556; S. Rep. No. 105-250 at 17; *see also* 5 U.S.C. § 3347(a).

Finally, the Government inflates the impact of the decision below for an additional reason: The D.C. Circuit analyzed the consequences of FVRA violations only for actions of the General Counsel of the NLRB. It did not consider the effect of FVRA violations in other offices. It also had no reason to consider the meaning of Section 3348(d), which provides that actions taken in violation of the FVRA shall have "no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d); *see* Pet. App. 20a-21a. That provision does not apply to the NLRB General Counsel. *See* 5 U.S.C. § 3348(e)(1). Thus, the Government's concern that the decision below will necessarily undermine a host of decisions by other acting officials is unfounded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SHAY DVORETZKY
Counsel of Record
EMILY J. KENNEDY
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Respondent

May 9, 2016